

MEMORANDUM

TO: Board of Trustees

THROUGH: Steven J. Pinkerton
General Manager

FROM: Tom Beko
Litigation Counsel

SUBJECT: Case No. CV18-01564 Mark E. Smith v. IVGID

- (1) Receive, review and discuss status report from litigation counsel, Tom Beko, Esq., regarding defense of lawsuit initiated by Mark E. Smith under Case No. CV18-01564 against the Incline Village General Improvement District ("IVGID"), IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.
- (2) Review, discuss and possibly approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over current authority of the General Manager).
- (3) Authorize litigation counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).

DATE: June 12, 2019

I. RECOMMENDATION

That the Board of Trustees makes a motion to:

Review, discuss and possibly approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over the current authority of the General Manager); and

Authorize Litigation Counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).

II. EXECUTIVE SUMMARY

Mr. Smith made a records request asking for all communications between District Legal Counsel Jason Guinasso and District Clerk Susan Herron and General

Manager Steve Pinkerton for a twenty-two (22) month period beginning January 1, 2016 and ending October 19, 2017.

This records request required an extraordinary amount of time and effort to prepare a response to because it required District Legal Counsel to identify over 13,000 potentially responsive documents, print and Bates stamp these documents, and then individual review each document to determine whether the documents were privileged and confidential. All but 304 of the 13,000 + documents were privileged and confidential.

Therefore, IVGID provided the 304 requested documents at \$1.00 per page. The rest of the documents were not produced because they were attorney-client privileged communication. Mr. Smith was informed of this decision in writing and was provided the appropriate legal authority.

Mr. Smith disagreed with this decision and filed a lawsuit on July 30, 2018, naming IVGID Board Chair Kendra Wong, and District Legal Counsel as Defendants. In his Complaint, his primary claims were:

He should not have to pay anything for the documents.

He should be able to receive the documents in electronic form.

He should be provided a log regarding all communication between legal counsel and staff.

As a consequence of this legal action taken by Mr. Smith, IVGID was forced to retain outside litigation counsel to defend the District, the District Board Chair, and District Legal Counsel. After six months of litigation which required responses to discovery requests, depositions, and preparation and responses to motions, the District Court decided that no trial would be necessary and denied IVGID's Motion for Summary Judgment, but entered an order granting summary judgment in favor of Mr. Smith.

However, in the decision, the Court made a number of findings which were actually favorable to IVGID's position. First, the Court found that Mr. Smith was not entitled to electronic (native) versions of the 304 documents originally produced in hard copy. This was the primary dispute that existed between Mr. Smith and IVGID and likely spawned this entire lawsuit.

With regard for the charge assessed by IVGID for the copies produced, (\$1.00 per page) the Court ruled that Mr. Smith must tender payment to IVGID at the rate of \$.50 per page for these documents. This portion of the order fully vindicates the District's demand that Mr. Smith pay for the records he sought rather than receive them electronically.

Thus, despite the Court denying IVGID's motion for summary judgment, the Court actually supported IVGID's actions vis-à-vis the documents requested which IVGID has always admitted were not privileged, and were otherwise available to Mr. Smith if he only tendered the requested payment. Rather than make the reasonable payment of \$299.00 for the documents he requested, Mr. Smith instead chose to file a lawsuit costing himself and the District tens of thousands of dollars so that he could ultimately pay \$149.50 for the documents he requested.

Moreover, with regard to whether IVGID was legally obligated to provide Mr. Smith with a Privilege Log under the Nevada Public Records Act pre-litigation when it withheld documents based upon the attorney-client privilege, the Court did not rule that IVGID had any such obligation pre-litigation. However, post-litigation the Court exercised its authority to order IVGID to produce a privilege log.

In summary, for the most part, the Court's ruling was a win for IVGID in that:

- 1) it affirmed IVGID's right to require payment for documents despite the fact that they are readily available in electronic form;
- 2) IVGID need not produce the document in digital form; and
- 3) pre-litigation, IVGID was not required to prepare and serve a privilege log.

Stated another way, the 304 documents produced in hard copy were produced in accordance with the law and must be paid for by Mr. Smith (Smith had argued he did not have to pay anything). Further, the attorney-client privilege was asserted correctly pre-litigation under the NPRA (no pre-litigation privilege log required).

Although the Court specifically ruled that IVGID was required *post-litigation* to produce a privilege log, the Court never specifically held that *pre-litigation* IVGID had any such obligation. However, because the Court seemingly entered an order finding in favor of Mr. Smith (which impliedly would have found that IVGID had a pre-litigation obligation to produce such a log), IVGID has asked the Court to clarify the ruling on this issue. That motion remains pending today and represents the need for additional litigation in the underlying matter.

I have opined that the Court's ruling on the post-litigation privilege log is also contrary to existing Nevada law in that the Court found that IVGID could not assert a "blanket" privilege over the withheld records and instead IVGID was required to provide a more detailed explanation of the withheld documents. The law clearly supported the manner in which IVGID asserted the privilege (albeit in a "blanket" form) because the privilege clearly and unmistakably applied to every document withheld. Under such circumstances, the "blanket" assertion of the privilege was

fully justified under existing law. If left intact, this aspect of the Court's ruling would again impose an enormous financial burden upon IVGID in that when future public records requests are received, IVGID would not be permitted to generally assert a privilege against production without providing what amounts to a privilege log individually describing each record withheld. Thus, I believe this aspect of the Court's ruling should be challenged in order to obtain appellate review and clarification of this key issue.

III. STATUS REPORT

This agenda item arises out of ongoing defense of a lawsuit filed by IVGID resident Mark E. Smith against IVGID, IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.

A. BACKGROUND

On October 19, 2017, Mr. Smith submitted a request to IVGID's Public Records Officer, Susan Herron to "access, inspect and copy" the following records:

All communications by any form including email between Jason Guinasso (the District's attorney) on the one hand, and both yourself and Steve Pinkerton on the other, for the period of January 1, 2016 to the date of this request, excluding any privileged communications but including a list of all excluded communications including the nature of each, as required by law.

Due to the nature of the request for communications between IVGID General Counsel and its General Manager, Mr. Pinkerton, and its Executive Assistant and District Clerk, Ms. Herron, IVGID's initial response on October 19, 2017, was that no public documents would be provided due to the privileged and confidential nature of attorney-client communications.

Later Mr. Smith clarified his request and explained that he was seeking documents outside the attorney-client privilege such as those that included Mr. Guinasso and Ms. Herron and a member of the public. Mr. Smith and Mr. Guinasso also met on October 31, 2017 to further discuss the request.

After receiving clarification from Mr. Smith about his request, IVGID began working on the request and sent an email to Mr. Smith on November 7, 2017. In that email, Mr. Guinasso confirmed Mr. Smith's request and the clarification that Mr. Smith expected that documents responsive to the request would include communications wherein a member of the public was included in the communication. Mr. Guinasso further informed Mr. Smith that, since the communications at issue covered nearly a two-year span, it would necessarily

take significant time and resources to locate, review, and produce the requested documents. Mr. Guinasso advised that he anticipated that it would take approximately 60 days to complete the request and that he anticipated providing the records on or before January 8, 2018.

On January 9, 2018, Mr. Guinasso provided an update to Mr. Smith and advised that, due to the volume of emails that have to be reviewed in response to Mr. Smith's request, an additional two weeks would be needed.

On February 2, 2018, Mr. Guinasso sent a letter to Mr. Smith to provide an update on the records request. Mr. Guinasso explained that the request required significant manpower to process it and that the request was still in process. Mr. Guinasso provided additional information as to the steps taken to date to satisfy the request including: (1) use of Staff and IT departments to search and obtain emails from the IVGID email server and General Counsel's email server; and (2) review of identified emails by IVGID General Counsel to ensure documents protected by the attorney-client privilege or work product doctrine were not inadvertently disclosed. *Id.* Mr. Guinasso further advised Mr. Smith that there are at least 1,000 additional emails that require review by General Counsel and that it was estimated to take until the end of February 2018, to complete that review.

Following a thorough and exhaustive review of the communications at issue, Mr. Guinasso provided a final response to Mr. Smith on April 27, 2018. Mr. Guinasso informed Mr. Smith of the applicability of the attorney-client privilege found at NRS 49.095 and the application of that privilege to the majority of the identified communications. Mr. Smith was also informed that the search and review of these documents took 120 hours of General Counsel time in order to determine the application of the attorney-client privilege, plus significant additional time of the IT department spent retrieving the communications. Mr. Guinasso stated that although it could be argued that Mr. Smith be responsible for paying for 13,000 pages of printed privileged communications, no such charge would be assessed.

To be clear, there was never any charge assessed to Mr. Smith for the entirety of the 13,000 pages of documents.

However, Mr. Guinasso did explain that copies of the records that were retrieved, reviewed, and determined to be non-privileged would be provided as a cost of \$1.00 per page after the first five pages. The non-privileged documents totaled 304 pages, and Mr. Smith was advised that the cost would be \$299 as provided by IVGID's Policy and Procedure 137. Mr. Smith was advised that upon receipt of his payment of \$299, the non-privileged records would be

provided to him. If the time of staff and General Counsel, as well as the technological resources used to complete the request were monetized, the \$299 fee would amount to a fraction of the cost incurred by IVGID in responding to Mr. Smith's request.

Mr. Smith objected to Mr. Guinasso's April 27, 2018 letter on the basis that he did not feel that the potentially privileged documents needed to be printed and that he should not be charged \$299 because he preferred to inspect the electronic files. Mr. Smith argued that Policy and Procedure 137 stated that documents available in a digital form will be provided at no charge, and he objected to the charge.

Thereafter, on July 30, 2018, Mr. Smith filed a lawsuit against IVGID, Kendra Wong, in her capacity as Chairwoman, and Mr. Guinasso, "individually and as counsel" and allegedly as, "de facto records officer for IVGID." The Complaint requested "Declaratory and Injunctive Relief to Compel Disclosure of Public Records."

The Nevada Public Agency Insurance Pool declined to provide coverage for the lawsuit because there is no coverage for lawsuits seeking declaratory and injunctive relief under the Nevada Public Records Act.

General Manager Pinkerton approved the defense against the litigation under the authority given to him under IVGID Board Resolution No. 495 Policy and Procedure 098), NRS Chapter 41, and Policy 3.1.0 (f) &(g) (the expenditure of public funds for contracted legal fees and costs, as well as the value of the law suit, was less than \$50,000, which was within the authority delegated to the General Manager).

The General Manager selected Litigation Counsel to defend against the lawsuit because of his history with IVGID defending against the lawsuit of Mr. Aaron Katz.

The Court set a trial date for April 8, 2019.

B. DISCOVERY AND MOTIONS FILED DURING LITIGATION

Mr. Smith engaged in aggressive discovery, including the submission of interrogatories, requests for production of documents, and requests for admissions. Mr. Smith also deposed General Manager Steve Pinkerton, District Clerk Susan Herron, Trustee Phil Horan, and Kendra Wong. Notably, Mr. Smith did not depose Mr. Guinasso who, quite frankly, was the only individual who possessed information relative to the issues in dispute in the matter.

After the foregoing discovery was completed, IVGID Legal Counsel filed a Motion for Summary Judgement.

Mr. Smith opposed this motion.

Mr. Smith file a motion for in camera inspection of all the records sought in the case. IVGID opposed this motion.

On or about April 5, 2019, the District Court provided notice to the parties that it was going to deny IVGID's motion for Summary Judgement and grant summary judgment on its own terms.

C. DISTRICT COURT ORDER

On May 10, 2019, the Court ordered that "summary judgment is granted in favor of Mark Smith and against Defendant Incline Village General Improvement District pursuant to Rule 56(f)..." Following that, the Court ordered that "summary judgment is not granted at this time against Jason Guinasso..." and that "summary judgment is not entered against Kendra Wong..." The Court noted that Chair Wong and Mr. Guinasso are not dismissed from the action but can seek dismissal by way of a separate motion. Therefore, the order was entered against IVGID only and not as to Ms. Wong and Mr. Guinasso.

The Court denied IVGID's motion, but entered an order granting summary judgment in favor of Mr. Smith. However, in the decision, the Court made a number of findings which were actually favorable to IVGID's position. First, the Court found that Mr. Smith was not entitled to electronic (native) versions of the 304 documents originally produced in hard copy. Due to security reasons, IVGID rejected Mr. Smith's demand for this information as it was concerned that allowing any person access to the native form of an email could result in alterations of the original email, or it could allow the recipient of the email to take subsequent actions (such as forwarding the email to others) in a manner in which it would appear to the recipient of the email that it had actually be sent by a representative of IVGID. This was the primary dispute that existed between Mr. Smith and IVGID and likely spawned this entire lawsuit.

With regard for the charge assessed by IVGID for the copies produced, (\$1.00 per page) the Court ruled that Mr. Smith must tender payment to IVGID at the rate of \$.50 per page for these documents. This portion of the order fully vindicates Mr. Guinasso's demand that Mr. Smith pay for the records he sought rather than receive them electronically. This would be true despite IVGID

resolution which purports to require IVGID to produce electronic copies of records when available.

Thus, despite the Court denying IVGID's motion for summary judgment, the Court actually supported IVGID's actions vis-à-vis the documents requested which IVGID has always admitted were not privileged, and were otherwise available to Mr. Smith if he only tendered the requested payment. Rather than make that payment, Mr. Smith instead chose to institute the current action.

A second key issue which was raised in the litigation related to the question of whether IVGID was legally obligated to provide Mr. Smith with a Privilege Log when it withheld documents based upon the attorney-client privilege. In order to respond to Mr. Smith's public records request, IVGID's staff was forced to individually review more than 13,000 pages of email communications. This task fell primarily upon Mr. Guinasso as the decision as to whether the document fell within the attorney-client privilege entailed a legal determination.

Because he believed that this public records request was instituted for the specific purpose of providing a platform upon which to commence litigation against IVGID, Mr. Guinasso undertook the exhaustive task of preparing a privilege log as it was believed that if litigation was actually commenced, the Court might require IVGID to then prepare such a log. As noted herein, the process of reviewing and cataloging the requested communications took over 120 hours.

While the Privilege Log was prepared, it was not produced to Mr. Smith pre-litigation as Mr. Guinasso was concerned that it would set an unwanted precedent which might spawn other disgruntled individuals to make incredibly burdensome records requests solely as a means by which to disrupt IVGID's operations.

As Mr. Guinasso suspected, **post-litigation** (meaning after a lawsuit is filed), the Court did order IVGID to produce a privilege log of the remaining records which were withheld. Notably, the Court did not rule that IVGID had any such obligation **pre-litigation** which, as set forth above, was one of the key issues which spawned this litigation and effectively forced IVGID to vigorously defend against the claims asserted. When the Court ordered IVGID to produce the privilege log, the Court required the log to include only the date of the communication, the author and recipient of the communication, whether a third party is party to the communication, and "a one word identifier for the property or outside entity involved."

When Mr. Guinasso originally prepared his privilege log, it contained all the information required by the Court, save and except the “one word identifier.” As a result, IVGID’s retained counsel were required to go back through the remaining 13,497 pages of withheld documents to add this additional identifier. That process is in the final stages of completion and the revised log is expected to be delivered to Mr. Smith’s counsel in the next few days. At the present time, it remains unknown whether Mr. Smith will take further action to ask the Court to find that any of the withheld documents do not fall within the asserted privilege. This appears to be all that remains with regard to the underlying litigation.

As detailed above, one of the primary reasons why IVGID has taken a firm position in this case is because of a concern that an adverse ruling might set a precedent for future matters which could impose an enormous financial burden upon IVGID. In entering its ruling, the Court did make it clear that the ruling was limited to the unique facts of this matter and as such should not be considered a precedent for blanket access to documents maintained by IVGID. However, despite this explicit holding, IVGID remains concerned that the Court’s actual rulings will have an adverse future impact upon IVGID’s operations.

In summary, for the most part, this ruling is a win for IVGID in that: 1) it affirmed IVGID’s right to require payment for documents despite the fact that they are readily available in electronic form, 2) IVGID need not produce the document in digital form, and 3) pre-litigation, IVGID was not required to prepare and serve a privilege log. Stated another way, the 304 documents produced in hard copy were produced in accordance with the law and must be paid for by Mr. Smith (Smith had argued he did not have to pay anything). Further, the attorney-client privilege was asserted correctly pre-litigation under the NPRRA. (no pre-litigation privilege log required).

This case also involved a procedural issue never before presented in any Nevada Court due to the fact that the Court’s ruling was only allowed due to a 2019 amendment to Nevada’s Rules of Civil Procedure. Under this recent amendment, a district court is allowed to grant summary judgment to a non-moving party (in this case, Mr. Smith) despite the fact that he never sought a pretrial ruling in his favor. While IVGID always maintained that this case raised only issues of law which must be decided only by the Court, it was a bit surprising that the Court took the opportunity to issue a ruling which, on its face, appeared to favor Mr. Smith in that it denied IVGID’s motion for summary judgment and found in favor of Mr. Smith.

As noted above, although the Court specifically ruled that IVGID was required *post-litigation* to produce a privilege log, the Court never specifically held that *pre-litigation* IVGID had any such obligation. However, because the Court seemingly entered an order finding in favor of Mr. Smith (which impliedly would have found that IVGID had a pre-litigation obligation to produce such a log), IVGID has asked the Court to clarify her ruling on this issue. That motion remains pending today and represents the need for additional litigation in the underlying matter.

IVGID's retained counsel has opined that the Court's ruling on the post-litigation privilege log is also contrary to existing Nevada law in the Court found that IVGID could not assert a "blanket" privilege over the withheld records and instead IVGID was required to provide a more detailed explanation of the withheld documents. IVGID's counsel believes that the law clearly supported the manner in which IVGID asserted the privilege (albeit in a "blanket" form) because the privilege clearly and unmistakably applied to every document withheld. Under such circumstances, the "blanket" assertion of the privilege was fully justified under existing law.

If left intact, this aspect of the Court's ruling would again impose an enormous financial burden upon IVGID in that when future public records requests are received, IVGID would not be permitted to generally assert a privilege against production without providing what amounts to a privilege log individually describing each record withheld. Thus, IVGID's counsel believes this aspect of the Court's ruling should be challenged in order to obtain appellate review and clarification of this key issue.

D. POST-JUDGEMENT LITIGATION

Mr. Smith paid the \$149.50 for the 304 documents that had been produced in hard copy to him in response to his original request for public records. IVGID provided Mr. Smith with a post-litigation privilege log.

Several post-judgment motions have been filed by Mr. Smith and IVGID, including the following recently filings:

Plaintiff's Memorandum of Costs: (whereby the plaintiff seeks his litigation costs, not including attorney's fees)

IVGID's Motion to Retrax Costs: (IVGID's challenge to the request for costs)

IVGID's Motion to Amend or For Additional Findings: (seeking the clarifications detailed above)

IVGID's Motion for Leave to File Motion for Reconsideration (also seeking clarification of the Court's ruling)

Plaintiff's Opposition to Motion to Retax Costs
Plaintiff's Motion for Attorney's Fees & Costs
IVGID's Reply in Support of Motion to Retax Costs

All of the forgoing motions are tied one way or another to the apparent inconsistency between the Court's *sua sponte* order granting summary judgment to Mr. Smith, while at the same time, issuing an order which effectively denied him much of the relief he sought. The plaintiff's motion for attorney's fees and costs are dependent upon the Court finding that he was the prevailing party in this case. And, while the general nature of the Court's rulings appear to favor Mr. Smith, when one reviews the actual Court rulings, the decisions mostly favor IVGID. Thus, it is upon this basis that IVGID will oppose these motions.

E. MERITS OF POTENTIAL APPEAL:

As set forth above, IVGID has two pending motions which seek clarification of the Court's ruling. There exists a possibility that the Court will revise its decision to make it clear that IVGID was not required, *pre-litigation* to serve Mr. Smith with a privilege log. If the Court does not, or if the Court enters a ruling which provides that pre-litigation IVGID had such an obligation, I believe that ruling would be entirely inconsistent with Nevada law and because of the enormous future burden that would place on IVGID thus a recommendation that such a ruling be appealed.

Additionally, regardless of the pending motions, it appears that the Court's ruling which would require IVGID to provide a detailed description of the privilege for each withheld document is contrary to existing law. If the Court's ruling continues unaltered, Litigation Counsel believes this issue should be appealed. However, such an appeal would be very simple, straightforward and inexpensive to pursue.

IV. LEGAL FEES AND COSTS

To date, I have accrued \$45,608.62 for legal fees and costs for the period of August 2018 to present. These costs included all the preparation for trial which was vacated (by the Court's ruling on IVGID's motion) just days before the trial was set to commence

Litigation Counsel estimates that \$15,000.00 will be needed to complete post-judgment litigation. This cost could be substantially less depending upon the two motions identified above, but could also increase if Ms. Smith seeks to further

challenge IVGID's assertion of the attorney-client privilege to any withheld document.

Mr. Smith has asked the Court for an award of attorney fees and costs of in the amount of \$23,065.00. This motion has not yet been opposed by IVGID and while there certainly exists a possibility that the Court might award Mr. Smith some of his fees and costs (for the matters upon which he did prevail, namely reducing the cost per page by \$.05), Litigation Counsel believes he will not be awarded the entirety of his claimed fees and costs.

I estimate that an Appeal of the District Court order, should it become necessary, will be \$15,000.00.

V. ALTERNATIVES

Do not approve continued defense of litigation beyond the General Manager's current authority.

Do not authorize litigation counsel to pursue an Appeal of the District Court's final disposition of the case.

VI. BUSINESS IMPACT

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.